

July 1, 2002

National Highway Traffic Safety Administration
Docket Management facility
400 7th Street, SW
Nassif Building, Room PL-401,
Washington, DC 20590

Re: Notice of Proposed Rulemaking, Docket No. NHTSA-02-12150, Confidential
Business Information

Ladies and Gentlemen:

The following are the comments of Harley-Davidson Motor Company to the above named docket number. Please place these comments in the public docket on this matter.

Harley-Davidson Motor Company (The Motor Company) is the nation's oldest and largest manufacturer of motorcycles. In 2003, we will be celebrating 100 years of continuous manufacture. We are pleased to be able to submit these comments for the record of the relatively "young" National Highway Traffic Safety Administration (NHTSA).

Unfortunately, we are not pleased about the direction and likely result of this proposal. Early in the development of a regulation under the TREAD Act, NHTSA asserted that it was the expert in determining what would be determined a safety defect and what would not. We can accept such a blanket claim, although we have developed some understanding of safety issues ourselves over the past hundred years.

However, if NHTSA claims that it is the expert in the safety arena, it must at the same time accept our assertion that The Motor Company is the expert in our industry. We are consistently ranked as one of the best places to work in the nation, not only in general, but also in such fields as information technology. We have enjoyed years of unprecedented growth, even in the face of a general economic decline, especially one affecting the automotive industry. In 2001, Forbes magazine named Harley-Davidson "Company of the Year."

Obviously, we know something about the competitive business of making and selling motorcycles.

INITIAL CONSIDERATION: TIMING

With this proposal, NHTSA is asking for comments relating to TREAD Early Warning reporting before that other rule has been released. This is outside of the experience of many of those who respond to regulatory proposals and somewhat akin to bowling with a sheet covering the pins. A formal request for an

extension has been denied. We therefore reserve the right to make further comments, as well as the right for due consideration of those comments by the agency, once the TREAD Early Warning final regulation has been released.

THE ESSENTIAL ERROR OF THE PROPOSAL

Rulemaking from NHTSA under the TREAD act will for the first time, require that vehicle manufacturers submit regular, periodic reports relating to manufacture, customer feedback, warranty and other programs to the agency. But, at the same time, it will insist that the information in these reports be subject to the same confidentiality requirements as other information heretofore submitted to the agency. But those materials were submitted on an irregular basis, or consisting of specific materials not part of a regular submission (The statutory authority asserted by NHTSA is based upon TREAD paragraph (4)(c), Disclosure, "None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121 of this title." The agency, in a memorandum dated October 27, 2000, sees no difference in this language and previous treatment of confidential information obtained by the agency, despite different language.).

Unlike past submissions, Harley-Davidson Motor Company has obtained the new information NHTSA seeks part and parcel as an integral function of our efforts to obtain and keep our competitive edge in the market place.

Production numbers. For example, motorcycle production numbers are traditionally confidential trade secrets throughout the industry. This may not be the case in the automobile field, but motorcycles and the motorcycle marketplace are not automobiles and the automotive market (The Motor Company will release total production numbers for its brands in Securities and Exchange Commission required financial documents, but does not release production information relating to specific models or variants. It is our information that this is also the case with most other motorcycle manufacturers.).

The motorcycle world is essentially a bundle of niches. Certainly, there are standard motorcycles, but these are today in the minority. There are also motorcycles meant for touring, luxu-touring, sport touring, sport, hyper-sport, dual-sport, trails, trials and many others.

Each motorcycle company bases its decisions of product mix on a combination of experience, customer feedback and intuition. The proposal would treat this information presumptively as not deserving of confidentiality once the model year has begun or vehicle production for sale to consumers has begun, it should instead presume that the information is confidential. Especially, the agency should understand that past production remains deserving of protection since future company plans are often based upon an evolution of production direction and experience. The availability of this information can bring a public light to our internal future planning.

Similarly, other information sought through TREAD, especially the early warning program, is deeply related to competition in the motorcycle marketplace.

Warranty. While there is some information available from private industry organizations, this is based upon their own research and not generally upon information released by the motorcycle companies. Company focus on continuous improvement, training programs for dealers and their mechanics, decisions on the

use of warranty as a marketing tool and a means for heightening customer approval and the likelihood of repeat sales, all enter into the equation.

Customer Contact. Unlike the automotive industry experience, companies like Harley-Davidson aggressively seek customer contact. For example, the Harley Owners Group (HOG) presents rallies and other opportunities for the owners of our machines to come together socially (Somewhat out of character, the Saturn brand of General Motors has performed several social gatherings along the lines of those performed by HOG and the Honda Riders Club. We do not know how successful these have been, but it is apparent that the history of Saturn marketing has been to place it as different from other automobile companies.). We think that this means we might have substantially more customer contacts than other industries. Motorcycle customers are perhaps unlike those of other industries as well. A perusal of the TREAD Early Warning docket shows that unlike other vehicle owners, motorcyclists are enthusiasts who care about their chosen activity and are not ever afraid to express their opinions. Our continued success depends upon the satisfaction of this group, if our methods of gathering information help us in this task, we should not be penalized competitively by the release of the information thereby obtained.

Dealer Contact and Field Reports. Our success is dependent upon the success of our dealers and the satisfaction of our customers. Harley-Davidson Motor Company has a fully developed system of contact with our dealer network. We want and need to know what others think we are doing right and what they think we are doing wrong. The information thereby gained has provided us with a great competitive advantage. It should not be released as a matter of course.

All of these efforts are part of what has helped Harley-Davidson Motor Company enjoy the success it experiences today. The agency's presumption of suitability for release of this, and similar information, will be detrimental to the future success of the Motor Company.

THE LEGITIMATE NEEDS OF THE AGENCY

The agency states that it has never granted confidentiality for this type of information in the past. However, the agency has also never before routinely requested the virtual universe of such data collected by the industries it regulates. We have certainly never before provided it.

For the purposes of this section only, we will assume that the agency has a legitimate need to obtain the information presented in the TREAD Early Warning NPRM. The early warning program is meant to enable NHTSA to make initial inquiry as to whether the information indicates a serious safety defect. Nothing in the enabling legislation or the Early Warning NPRM even remotely suggests that the agency is to be assisted in this effort by any sort of citizen or NGO action as is the case, say, in some sorts of environmental legislation. Therefore, the need to routinely release to anyone any of the information obtained in order to "assist in carrying out" the requirements of the TREAD Act should be very rare.

However, in the Early Warning NPRM, the agency already denied the desire of Harley-Davidson Motor Company and others, as presented in comments to the ANPRM, to delete many of the items we felt were not related in any way to safety from the warranty, customer and other claims and complaints to be reported to the agency. It was in this context that the agency made its claims that it was the arbiter of what constituted a safety issue.

The agency therefore already knows it will be collecting data that is likely to be in no way related to its primary charge and congressional mandate for safety. In doing so, it takes on a duty to protect such information from public release, especially where, as here, it is already under notice that release of the information would subject the regulated company to competitive disadvantage.

ANOTHER INTERPRETATION OF THE CONGRESSIONAL INTENT

The agency memo of October 27, 2000 from Mr. Seals says (at page 3), that "(t)he only reference to paragraph (4) (C) in the legislative history of TREAD occurred in a colloquy between Chairman Tauzin and Representative Markey. There, Chairman Tauzin agreed with Mr. Markey's statement that the 'special disclosure provision for new early stage information is not intended to protect [information] from disclosure that is currently disclosed under existing law...'" Mr. Seals goes on to state that therefore the paragraph isn't intended to place any further protections on early information as it could be interpreted to replicate the current language.

If indeed, this were the intent, the legislation would have replicated the current language.

One long-standing standard for review of congressional actions is that the Congress is expected to use a paucity of language. If Congress meant for one paragraph to mean the same thing as another, then it would be expected to repeat the phrase. If it meant something else, as here, then it will use different words. Congress can be expected to know that different words have different meanings, and that dissimilar words will be an indication that something else was meant.

We can accept that the portions of information now reported under current requirements will continue to be subject to the same limitations on confidentiality as they are today. Due to their nature, such items are necessarily about different subjects, and a confidentiality protection would reasonably have to arise on a case by case basis.

However, here, we will be regularly providing information that we do consider confidential, on a regular weekly and monthly basis, the same sorts of information over and over again, in reports that may very well be cumulative in nature. It would be absurd to think that the Congress would believe that our company and others in the industry would be required to repeat, in a soon meaningless rote, the same "magic words," over and over again, once a month, once a quarter, on the same information.

Therefore, the intent of the language is plain on its face, that the current information isn't affected, but that the new, early warning reports are, unless they are determined by the Secretary to be of assistance in carrying out the purposes of the Act. Such a determination, of necessity to be placed on the specific information to be released, would then be subject to the current provisions.

However, since it is intended for the agency to be the arbiter of what might constitute a safety defect under Early Warning, we would expect that a determination to disclose would be an extremely rare event. This legislation contains no authorization for a citizen or NGO cause of action or deputation to the agency. We can see no other reason in the legislation to release information that we have treated confidentially for so long.

CONCLUSION

The proposal is not able to deal with the very real considerations of business confidentiality that we place on the information. Further, a requirement that manufacturers request confidentiality for essentially the same information on a monthly or quarterly basis is unreasonable.

The agency therefore must delete the sections of the proposal discussing any presumption that the information presented to NHTSA under the Early Warning requirements is not confidential. The legitimate needs of industry must be considered by the agency in a more reasonable manner.

Thank you for the opportunity to provide these comments. We shall be submitting follow-up comments once the TREAD Early Warning final rule has been released. If there are any questions, please contact the undersigned.

Sincerely,

Eric J. Lundquist
Motorcycle Regulatory Affairs
Harley-Davidson Motor Company
11800 West Capitol Drive
Wauwatosa, WI 53222
Voice: 414.616.1852
Fax: 414.616.1430
eric.lundquist@harley-davidson.com